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No. 10-914

In The
Supreme Court of the United States

MOHAMED POONJA, TRUSTEE, PETITIONER

v.

JACK TRAMIEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented as stated in the petition are based on mischaracterizations of the governing law and the decision below. The questions actually presented are as stated here.

1. Section 550(a) of the Bankruptcy Code provides that in the case of a constructive fraudulent transfer, the trustee may recover either the property transferred or its value, but only "to the extent that a transfer is avoided" under the applicable provision. Section 544(b) permits the trustee to invoke state fraudulent transfer provisions, but it permits avoidance only to the extent that the transfer is "voidable under applicable [state] law." The question presented is:

> When the trustee proceeded under state law to avoid a constructive fraudulent transfer, whether the court of appeals correctly applied a state statute that expressly provides that the amount avoidable is reduced by the value of the consideration paid by the good faith transferee.

2. Section 3439.04 of the California Civil Code provides that a transfer is constructively fraudulent if, inter alia, the debtor did not receive a "reasonably equivalent value" in exchange for the transfer. Although Section 550(a) of the Bankruptcy Code permits recovery of fraudulently transferred property or its "value," recovery is expressly limited to only "the extent that a transfer is avoided" under Section 544(b) and therefore state law. Thus, here, the court

QUESTIONS PRESENTED – Continued

of appeals determined the transferred properties' "reasonably equivalent value" under the California statute. The question presented is:

> When the trustee proceeded under California law to avoid a constructive fraudulent transfer, whether the court of appeals correctly determined "reasonably equivalent value" under Section 3439.04 of the California Civil Code by reference to state law, rather than by reference to interpretations of "value" in Section 550 of the Bankruptcy Code and other provisions of federal law.

3. Section 550(d) of the Bankruptcy Code provides that a "trustee is entitled to only a single satisfaction" under Section 550(a). Section 550(a), in turn, provides that a trustee can recover only "to the extent that a transfer is avoided under section 544," which permits avoidance only to the extent that the transfer is "voidable under applicable [state] law." 11 U.S.C. § 544(b). Section 877 of the California Code of Civil Procedure provides a method for determining whether a non-settling defendant's liability should be offset by a settlement reached with other defendants. The question presented is:

> When the trustee proceeded under state law to avoid a constructive fraudulent transfer, and the trustee and other defendants settled relevant claims in connection with the transfer, whether the court of appeals correctly applied California law to determine a non-settling defendant's liability.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
STATEMENT	2
A. Statutory Framework	2
B. Factual Background	4
C. Proceedings Below	6
1. Proceedings in the bankruptcy court	6
2. Proceedings in the district court	12
3. Proceedings before the court of appeals	13
REASONS THE PETITION SHOULD BE DENIED	16
I. NO CIRCUIT CONFLICT EXISTS AS TO WHETHER, WHEN USING STATE LAW TO AVOID A TRANSFER UNDER SECTION 544(b), STATE LAW GOVERNS THE AMOUNT THAT MAY BE AVOIDED, AND THE DECISION BELOW IS CORRECT	16
A. There Is No Conflict Among The Courts Of Appeals	17
B. The Decision Below Correctly Held That Section 3439.08 Of The California Civil Code Reduces The Amount That The Trustee May Avoid	21

TABLE OF CONTENTS – Continued

Page

II. THE COURT OF APPEALS CORRECTLY APPLIED CALIFORNIA'S DEFINITION OF "REASONABLY EQUIVALENT VALUE," AND THAT DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS 25

A. There Is No Conflict Among The Courts Of Appeals 25

B. Even If There Were A Disagreement Among The Circuits, This Case Would Not Be A Suitable Vehicle To Resolve It 29

III. THERE IS NO CONFLICT CONCERNING ENTITLEMENT TO SETTLEMENT CREDITS FOR CONSTRUCTIVE FRAUDULENT TRANSFER LIABILITY, AND THE DECISION BELOW IS CORRECT IN ANY EVENT 31

A. The Lower Courts Are Not In Conflict Over Whether Federal Or State Law Governs Entitlement To Settlement Credits When The Trustee Brings A Fraudulent Transfer Claim Under State Law 31

B. Even If There Were A Conflict, This Case Would Not Be A Suitable Vehicle To Resolve It 33

CONCLUSION 35

TABLE OF CONTENTS – Continued

Page

APPENDIX:

California Civil Code § 3439.04 .....1a

California Code of Civil Procedure § 877.....3a

TABLE OF AUTHORITIES

Page

CASES:

Associates Commercial Corp. v. Rash, 520 U.S. 953 (1997) 26, 27, 28

Bailey v. Leeper, 298 P.2d 684 (Cal. Ct. App. 1956) 26

BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) 26, 27, 28

Bowers v. Kuse Enterprises, Inc. (*In re Florida Hotel Properties Limited Partnership Plan Trust Agreement*), 172 F.3d 43, 1998 WL 957455 (4th Cir. 1998) 33

Boyer v. Crown Stock Distribution, Inc., 587 F.3d 787 (7th Cir. 2009) 18, 19, 20

Cort v. Ash, 422 U.S. 66 (1975) 28

Hansen v. Cramer, 245 P.2d 1059 (Cal. 1952) 26

In re Calvillo, 263 B.R. 214 (W.D. Tex. 2000) 30

In re Hurtado, 342 F.3d 528 (6th Cir. 2003) 18

In re Lendvest Mortgage, 42 F.3d 1181 (9th Cir. 1994) 33

In re Prudential of Florida Leasing, Inc., 478 F.3d 1291 (11th Cir. 2007) 32

In re Red Dot Scenic, Inc., 351 F.3d 57 (2d Cir. 2003) 18

In re Straightline, 525 F.3d 870 (9th Cir. 2008) 20, 21

In re Taylor, 599 F.3d 880 (9th Cir. 2010) 28

In re Trout, 609 F.3d 1106 (10th Cir. 2010) 29

TABLE OF AUTHORITIES – Continued

Page

Sommerville v. United States, 376 U.S. 909 (1964) 31

Suhar v. Burns, 322 F.3d 421 (6th Cir. 2003) 18

Walsh v. Alpha Fin. Group (In re Rice), 83 B.R. 8 (B.A.P. 9th Cir. 1987) 21

FEDERAL STATUTES:

11 U.S.C.

§ 502(h) 24

§ 544 ..... *passim*

§ 544(b) ..... *passim*

§ 544(b)(1) 2, 13

§ 548 ..... 2, 23, 26, 32

§ 548(c) 2, 15, 23 26

§ 549 ..... 20, 21, 33

§ 549(a)(2)(B) 21

§ 550 ..... *passim*

§ 550(a) 2, 16, 17, 21

§ 550(b) 17, 18, 19

§ 550(d) 32

§ 551 29

§ 1325(a)(5)(B) 26, 27

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES AND REGULATIONS:

Cal. Civ. Code § 3439 et seq 2

§ 3439.04 ..... 3, 25

§ 3439.04(a) 13, 25, 27

§ 3439.04(a)(2)(B) 3

§ 3439.07 ..... 3, 4, 15

§ 3439.07(a) 22

§ 3439.07(a)(1) 4, 9

§ 3439.08 ..... *passim*

§ 3439.08(d)(3) 4, 14, 22

Cal. Civ. Proc. Code

§ 877 ..... 3, 10, 11, 15

§ 877(a) 10

OTHER AUTHORITIES:

Eugene Gressman et al., SUPREME COURT PRACTICE (9th ed. 2007) 31, 35

S. Ct. R. 10 28

INTRODUCTION

The petition for a writ of certiorari attempts to manufacture circuit conflicts, claiming one for every major issue on which petitioner lost below. But no court has recognized any of these alleged conflicts. And none of them exists. Indeed, the questions as framed in the petition are based on mischaracterizations of the governing law and the decision below. *Compare* Pet. i-ii *with* pages i-ii, *supra*.

Moreover, the court of appeals' decision is correct. The court applied the plain text of the relevant Bankruptcy Code provision, Section 544(b), which permits a trustee to avoid a transaction only to the extent that it is avoidable under state law. Under applicable state law, the court correctly concluded that respondent was not liable to petitioner.

Contrary to petitioner's claims (*e.g.*, Pet. i), the disputes at issue do not arise under Section 550 of the Bankruptcy Code. Nor did the court of appeals use its "equitable powers," as petitioner claims. Pet. i. Rather, the court merely followed applicable state law, which expressly disallows the unprecedented result sought by petitioner. In attempting to obtain review in this Court, the petition ignores the key portion of the applicable state statute. Indeed, notwithstanding petitioner's mischaracterization, the key dispute here does not even present a substantial question of federal law.

The petition for a writ of certiorari should be denied.

STATEMENT

A. Statutory Framework

1. The Bankruptcy Code gives a trustee the choice of proceeding under either federal or state law to avoid a constructive fraudulent transfer—*i.e.*, a transfer of property where the insolvent debtor did not receive reasonably equivalent value in exchange. Section 548 of the Bankruptcy Code is the federal fraudulent transfer provision and permits a trustee to avoid such fraudulent transfers under certain circumstances. Section 548(c) gives good faith transferees of constructive fraudulent transfers a lien on the transferred property "to the extent that such transferee * * * gave value to the debtor." 11 U.S.C. § 548(c). Alternatively, Section 544 permits a trustee to invoke state fraudulent transfer provisions. Section 544(b) provides that "the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law." *Id.* § 544(b)(1). Here, relying on Section 544(b), petitioner pursued claims against respondent under California Civil Code § 3439 et seq., California's version of the Uniform Fraudulent Transfer Act.

If a transfer is avoidable under Section 544 or Section 548, then Section 550 gives the trustee the option to recover either the property itself or its value: "Except as otherwise provided in this section, * * * the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property * * * ." *Id.* § 550(a).

But under Section 550, the trustee may recover only "to the extent that a transfer is avoided under [state law through] section 544 * * * [or federal law through] 548." *Ibid.* Thus, when (as here) state law expressly bars liability, then no liability arises—notwithstanding Section 550's "[e]xcept as otherwise provided herein" language—because there is liability under Section 550 only "to the extent that" it arises under state law incorporated by Section 544.

2. Section 3439.04 of the California Civil Code establishes whether a particular transfer was constructively fraudulent. It provides that "[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor * * * if the debtor made the transfer or incurred the obligation" "[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor" "[i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due." Cal. Civ. Code § 3439.04(a)(2)(B).[1]

Section 3439.07 establishes the extent to which a fraudulent transfer is voidable under California law (and, therefore, under Section 544 of the Bankruptcy Code). It provides that "a creditor, *subject to the*

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[1] As the petition appendix does not include Section 3439.04 of the California Civil Code or Section 877 of the California Code of Civil Procedure, they are attached in an appendix to this brief in opposition.

limitations in Section 3439.08, may obtain," inter alia, "[a]voidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim." *Id.* § 3439.07(a)(1) (emphasis added).

Section 3439.08, which expressly limits Section 3439.07, provides that if the fraudulent transfer was made to a good faith transferee (as here), the voidable amount is reduced by the value of the purchase price that the transferee paid: "Notwithstanding voidability of a transfer or an obligation under this chapter, a good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to * * * [a] reduction in the amount of the liability on the judgment." *Id.* § 3439.08(d)(3). Were it otherwise, the trustee would obtain a double recovery by retaining the value already paid in addition to recovering the value of the transfer.

B. Factual Background

Respondent Jack Tramiel was the chairman of the board of directors of Atari Corporation ("Atari") in 1996, when Atari merged with and into JTS Corporation ("JTS"). As part of the merger, Tramiel became a director of JTS. The primary purpose of the JTS-Atari merger was to provide working capital to JTS, which was in dire financial straits. Pet. App. 4a.

In the merger, JTS was set to acquire, inter alia, eight separate pieces of Atari's real estate located in California and Texas that were not needed by JTS. To generate additional capital, JTS's chief financial

officer urged that Tramiel purchase these pieces of property. Tramiel agreed to purchase the properties for $10 million and to give JTS a one-year option to repurchase the property for $10 million. If JTS had exercised the option, then Tramiel would have kept the greater of $1 million or the rental income generated by the property during the one-year option period. *Id.* at 4a-5a.

The deal was supported by JTS's outside counsel, and JTS's board of directors approved it in June 1996. Although Tramiel was a member of the board, he recused himself from the decision and was not present for boardroom discussions about the proposed transaction. *Id.* at 5a. Tramiel told the board that they should obtain an independent assessment of the value of the properties. *Id.* at 71a. JTS's board ultimately concluded that the sale to Tramiel was the quickest and most efficient way to raise the additional capital needed to keep JTS afloat. The board recognized that selling the pieces of property individually on the open market would likely generate more capital than the package sale to Tramiel. *Id.* at 5a. But because JTS urgently needed the funding, the board believed the overall deal to be fair and in JTS's best interests. The sale closed in September 1996. *Ibid.*

JTS marketed the properties for sale during the one-year option period but never found a buyer and never exercised the option. The parties stipulated that the properties generated net rental income of $1,387,185 during the option period. *Id.* at 72a-73a.

JTS took several other steps to generate funding to stay in business. All of JTS's efforts, however, proved unsuccessful. In November 1998, JTS was forced into bankruptcy through an involuntary petition. JTS then filed a Chapter 11 petition, which was converted to one under Chapter 7 in 1999. *Id.* at 5a. Thereafter the bankruptcy trustee appointed in the case sued various parties, including Tramiel and many other participants in the sale of the properties.

C. Proceedings Below

1. Proceedings in the bankruptcy court

a. The bankruptcy trustee brought this action in 2003 against Tramiel, the other JTS directors, JTS's attorneys, and a JTS shareholder. Pet. App. 65a. As relevant here, the trustee claimed that the sale of the real estate to Tramiel was a fraudulent transfer and sought avoidance under Section 544. All defendants except Tramiel reached a settlement with the trustee and agreed to pay the estate a total of at least $4.5 million. *Id.* at 6a.

b. After trial, the bankruptcy court found in 2005 that the sale of the properties to Tramiel was avoidable as a constructive fraudulent conveyance under Section 544(b) of the Bankruptcy Code and Section 3439.04(a) of the California Civil Code. *Id.* at 84a. The court held that Tramiel did not give JTS a reasonably equivalent value for the properties.

The bankruptcy court found that the value of the properties would have been $15,760,000 if they had

been sold separately after being exposed to the market for a year. *Id.* at 85a. But because the properties were sold as a bundle, the court found, "[a]fter careful consideration of the presentations by both [sides'] experts, * * * that a 20% discount for bundling the properties is appropriate." *Id.* at 86a. The court also found that "a further 5% discount should be applied for the quick sale." *Ibid.* The court stated that the discounts "make[ ] sense because the buyer accepts the risk of less attractive properties that are bundled with the more valuable pieces and because the seller loses the competitive benefit of a normal marketing period." *Ibid.*

The court rejected the trustee's argument that no discount should apply because Tramiel insisted on purchasing the entire portfolio and because there was no financial need to complete the sale so quickly: "[T]he evidence establishes that JTS wanted both a bundled sale and a quick sale." *Ibid.* It was JTS, not Tramiel, that "set the original tone of this transaction as a bundled sale." *Ibid.* Additionally, "JTS had been insolvent for some months and its financial condition was deteriorating rapidly. The company needed cash and needed it quickly to fund continued operations." *Ibid.* The court found that "JTS was willing to accept something less than the best price to get cash fast." *Id.* at 87a. Applying both discounts, the court found the value of the portfolio to be $11,820,000. *Id.* at 88a.

To determine whether Tramiel gave JTS reasonably equivalent value, the bankruptcy court added

together the $10 million in cash that Tramiel paid, plus the value of the one-year repurchase option that Tramiel gave JTS. *Ibid.* The court calculated the value of the repurchase option by subtracting the strike price of the repurchase option (the amount JTS had to pay to exercise the option) from the properties' value. *Id.* at 88a-89a. Although JTS had to pay only $10 million to exercise the option, the court held that the actual strike price was $10 million plus the rental income during the option period because "to exercise the option, JTS not only had to pay $10 million, it also had to relinquish all rights it had to $1,387,185, the option year's net rental income from the properties." *Id.* at 89a. The court therefore found the strike price to be $11,387,185. *Ibid.* The court thus determined the price of the option to be $432,815—the properties' value of $11,820,000 minus the strike price of $11,387,185. *Ibid.*

Adding together the cash that Tramiel paid ($10 million) and the value of the option ($432,815), the bankruptcy court found that Tramiel paid JTS a total consideration of $10,432,815 for the properties. *Ibid.* Because of the difference between the $11,820,000 value of the properties and the $10,432,815 that Tramiel paid in good faith, the court held that JTS did not receive reasonably equivalent value for the properties and that the transaction was avoidable as a constructive fraudulent conveyance. *Id.* at 89a-90a.

c. The bankruptcy court then calculated Tramiel's liability and explained the rationale for its rulings.

The trustee argued that under Section 550 of the Bankruptcy Code, Tramiel should be liable for the full value of the properties transferred, $11,820,000, rather than the difference between the $11,820,000 value and the $10,432,815 that Tramiel already had paid.

The bankruptcy court rejected that argument. The court noted that Section 544 of the Bankruptcy Code "merely allows a bankruptcy trustee to assert avoidance powers that are otherwise available under state law." *Id.* at 90a. Thus, "the trustee may only avoid the real properties to the extent permitted in § 3439.07" of the California Civil Code. *Ibid.* Section 3439.07(a)(1) provides that "the ability to avoid a transfer is expressly subject to the limitations set forth in § 3439.08." *Ibid.* One such limitation in Section 3439.08 is that "a good faith transferee is entitled, to the extent of the value given the debtor for the transfer, to a reduction in the amount of liability on the judgment." *Id.* at 91a. Thus, "if Tramiel is a good faith transferee, the transaction may only be avoided to the extent that the value of the real properties exceeded the value that Tramiel gave to JTS." *Ibid.*

The court found that Tramiel was a good faith transferee. The court stated that "there is no evidence that Tramiel intended to take advantage of JTS when he purchased the portfolio of real property." *Ibid.* "Rather, the evidence is overwhelming that Tramiel honestly believed that he was helping the company by allowing it to get immediate access to

cash, while protecting it if JTS could ultimately find a buyer willing to pay a higher price." *Ibid.*

Therefore, the court calculated Tramiel's liability as the difference between the value of the properties and the value of what Tramiel paid: $1,387,185. *Ibid.*

d. The bankruptcy court held that Tramiel was entitled to a credit against that liability on account of the $4.5 million settlement that his co-defendants already had paid the estate. *Id.* at 143a. In so doing, the bankruptcy court applied California law, Section 877 of the California Code of Civil Procedure. The court stated that "when State law forms the substance of the underlying claim, Federal Courts will apply State Court settlement procedures in determining whether a settlement credit is appropriate." *Id.* at 144a; *see also id.* at 114a. Under Section 877, when a settlement is reached with some but not all "tortfeasors claimed to be liable for the same tort," it reduces the claims against the non-settling tortfeasors "in the amount stipulated by the release * * * or in the amount of the consideration paid for it whichever is the greater." Cal. Civ. Proc. Code § 877(a); *see also* Pet. App. 144a. The purpose of this provision is "to avoid a double recovery for the same injury." Pet. App. 144a.

The bankruptcy court held that the settling defendants and Tramiel were all joint tortfeasors, because the trustee "also alleged that the settling defendants were responsible for the estate's injuries arising out of the sale of the real property to Tramiel." *Id.* at 145a. Thus, at least some of the settlement

amount would be available to satisfy the claim against Tramiel.

To determine how much of the settlement to allocate to the claims arising out of the property sale to Tramiel, the bankruptcy court noted that "settling parties can agree to allocate portions of the total settlement amount to particular claims," and "the portions allocated to the non-joint claims will be excluded from the amount available for setoff by the non-settling defendant." *Id.* at 145a. But here, when the trustee entered into the settlement with the other defendants, the parties did not allocate the total settlement between particular claims. The court stated that under the "plain language" of Section 877, "where there is no agreed allocation, the full amount of the settlement consideration paid is available for setoff on all joint claims." *Id.* at 146a-147a. Thus, the court held that the full $4.5 million in consideration paid in the settlement was available to offset the judgment against Tramiel. *Id.* at 148a.

The bankruptcy judge further stated that if she were actually to allocate the settlement among the joint and non-joint claims, the result would be the same: "I considered what I might do in terms of allocating the settlement now. If I were to undertake an allocation at this point in the case, it's likely that I would follow the judgment that I've already entered, and I realized that result would really be the same as following the plain words of the statute." *Ibid.*

Because the $4.5 million settlement amount was "more than enough to fully offset Tramiel's liability related to the purchase of the real properties," the bankruptcy court held that the trustee could recover nothing from Tramiel. *Id.* at 149a.

2. Proceedings in the district court

The district court affirmed in part and reversed in part.

a. As to whether Tramiel's liability could be reduced by the value of the consideration Tramiel paid to JTS as a good faith purchaser, the district court held that "the bankruptcy court properly permitted Tramiel to set off the value he gave for the properties when adjudicating his liability." *Id.* at 52a. The district court also "ha[d] no difficulty concluding that the bankruptcy court's finding of good faith was not clearly erroneous." *Ibid.*

b. In calculating Tramiel's liability, however, the district court held that "fair market value is the appropriate starting point." *Ibid.* Thus, the court calculated the properties' value as $15,760,000, without any discount for bundling and a quick sale, plus the option-period rents of $1,387,185. The court determined the properties' "total fair market value" to be $17,147,185. *Id.* at 53a.

The district court thus calculated Tramiel's liability as the $17,147,185 value of the properties minus the $10,432,815 in consideration that Tramiel paid JTS, for a total liability of $6,714,370. *Ibid.*

c. As to the settlement credit, the district court also applied California law but held that Tramiel was not entitled to any credit for the $4.5 million settlement. The court held that the settlement agreement allocated the settlement funds to claims other than the claim against Tramiel. *Id.* at 56a.

3. Proceedings before the court of appeals

A unanimous court of appeals agreed with the bankruptcy court's decision and affirmed it in full.

a. The court of appeals held that the bankruptcy court's finding that the properties' value was $11,820,000 was not clearly erroneous. *Id.* at 11a. The court explained that under Section 544(b)(1) of the Bankruptcy Code, a transfer may be avoided only to the extent that it may be avoided under state law. And under Section 3439.04(a) of the California Civil Code, a transfer is avoidable to the extent the debtor did not receive a "reasonably equivalent value." *Id.* at 10a.

In determining reasonably equivalent value, California law permits courts to "consider the fair market value or what would be the fairly equivalent value of the property, taking into consideration all of the specific circumstances of each case affecting the value of the asset." *Id.* at 10a-11a. Thus, the bankruptcy court did not clearly err by applying a 5% reduction for a quick sale and a 20% reduction for

a bundled sale. *Id.* at 11a. The court of appeals reasoned: "Evidence showed that JTS wanted immediate cash and was willing to take a reduced price for the real property to obtain the funds quickly." *Ibid.* "JTS wanted a quick and bundled sale and even [the trustee's] expert agreed that reductions for a quick and bundled sale were proper if a seller required those terms." *Ibid.*

The court of appeals also concluded that the bankruptcy court did not clearly err in finding that the value of the repurchase option was $432,815 under those circumstances. *Id.* at 12a.

b. The court of appeals agreed with both the district court and the bankruptcy court that Tramiel's liability should be reduced by what he paid JTS as a good faith purchaser under Section 3439.08 of the California Civil Code. The court of appeals rejected the trustee's novel argument that "the interplay of §§ 544(b) and 550 requires full avoidance, and that California Civil Code § 3439.08(d)(3) is not applicable because" it "cannot limit the transferee's avoidance." *Id.* at 20a.

The court reasoned that the text of Sections 544 and 550 require California law to be applied to calculate the amount that may be avoided. *Id.* at 15a. The court explained that Section 550 authorizes recovery of the value of the property transferred, but only to the extent it is avoided under Section 544. *Ibid.* And Section 544 allows the trustee to avoid only a transfer that could have been avoided under applicable state

law. *Id.* at 14a. Section 3439.07 of the California Civil Code "allows relief of avoidance 'to the extent necessary to satisfy the creditor's claim,'" but that "is expressly made 'subject to the limitations in Section 3439.08'—and those limitations include a reduction for what a good faith transferee paid." *Id.* at 20a (quoting Cal. Civ. Code § 3439.07). Further, this result is consistent with the intent of Section 550: "The purpose of § 550 is to restore the estate to the financial condition it would have enjoyed if the transfer had not occurred." *Id.* at 15a (citation omitted). The court of appeals noted that this result is consistent with the similar protection afforded good faith buyers under Section 548(c). *Id.* at 25a.

c. The court of appeals also held that the $4.5 million settlement offset Tramiel's $1,387,185 liability. As the bankruptcy court and the district court both did, the court of appeals applied Section 877 of the California Code of Civil Procedure.

The court of appeals agreed with the bankruptcy court that Tramiel and the settling defendants were jointly liable: "Here, the trustee alleged Tramiel and the settling defendants combined to carry out the same injury, *i.e.*, the fraudulent transfer of the real property. * * * It is irrelevant that the trustee alleged different torts against Tramiel and the settling defendants since their concerted conduct produced the same injury * * * ." *Id.* at 29a. And the court held that under Section 877, because there was "no stipulated good faith allocation" in the agreement, Tramiel

was "entitled to an offset * * * of the entire settlement amount paid to the trustee." *Id.* at 32a.

Because the $4.5 million settlement credit exceeded Tramiel's liability, the court held that "Tramiel has no liability to the trustee for the conveyance." *Id.* at 33a.

REASONS THE PETITION SHOULD BE DENIED

I. NO CIRCUIT CONFLICT EXISTS AS TO WHETHER, WHEN USING STATE LAW TO AVOID A TRANSFER UNDER SECTION 544(b), STATE LAW GOVERNS THE AMOUNT THAT MAY BE AVOIDED, AND THE DECISION BELOW IS CORRECT

Contrary to petitioner's assertion, no conflict among the circuits exists as to the question whether a good faith transferee of property found to have been constructively fraudulently conveyed may "assert defenses not otherwise provided in § 550" of the Bankruptcy Code. Pet. i (emphasis omitted). In fact, Tramiel did not assert a "defense" under Section 550 in the manner that petitioner suggests. Rather, he asserted that he was not liable in the first instance because, under Section 550(a), recovery is permitted only to the "extent that a transfer is avoided" under state law through Section 544. As all three courts below correctly held that because Tramiel was a good faith transferee, Section 3439.08 of the California Civil Code reduces the amount that may be avoided under California law by the value of what Tramiel

paid JTS. That decision, which ultimately turns on state rather than federal law, does not warrant this Court's review.

A. There Is No Conflict Among The Courts Of Appeals

1. Petitioner claims that the decision below conflicts with five decisions from courts of appeals supposedly holding that "initial transferees are strictly liable and may not assert defenses that § 550 does not expressly provide." Pet. 12. But those decisions do not address the issue here. Rather, the question at issue in those cases was whether, under Section 550, the defendant was an *initial* transferee or a *subsequent* good faith transferee.

Under Section 550(a), the trustee may recover the fraudulently transferred property or its value from "(1) the initial transferee" or "(2) any immediate or mediate transferee of such initial transferee." 11 U.S.C. § 550(a). But Section 550(b) gives a defense to liability to certain "immediate or mediate" transferees (*i.e.*, someone who received the property from the initial transferee). Section 550(b) provides that "[t]he trustee may not recover under section (a)(2) of this section from" "(1) a transferee that takes for value * * * in good faith, and without knowledge of the voidability of the transfer avoided" or "(2) any immediate or mediate good faith transferee of such transferee." *Id.* § 550(b).

The issue in the cases cited by petitioner was thus whether that Section 550(b) defense applied—*i.e.*,

whether the transferee was a *subsequent* good faith transferee with immunity or an *initial* transferee who was strictly liable. *See, e.g.*, *In re Red Dot Scenic, Inc.*, 351 F.3d 57, 58 (2d Cir. 2003) (holding defendant "was not the initial transferee"); *In re Hurtado*, 342 F.3d 528, 536 (6th Cir. 2003) (holding defendant had "the requisite dominion and control over the disputed funds as to make her an initial transferee"). That question involves whether a trustee can recover on an avoidable transaction from a particular defendant, *not* whether the transaction itself is avoidable and, if so, in what amount. *See, e.g.*, *Hurtado*, 342 F.3d at 532 (quoting *Suhar v. Burns*, 322 F.3d 421, 427 (6th Cir. 2003) ("explaining that 'avoidance and recovery are distinct concepts and processes' that 'are addressed in two separate sections of the code' ").

Here, there is no dispute that respondent Tramiel was an initial transferee and thus cannot invoke the Section 550(b) complete defense to liability. But he is strictly liable only for the amount that is avoidable under California law *after* applying the Section 3439.08 reduction for the value he paid JTS. The cases petitioner cites do not hold otherwise.

2. Nor does the decision below conflict with the Seventh Circuit's decision in *Boyer v. Crown Stock Distribution, Inc.*, 587 F.3d 787 (7th Cir. 2009). Pet. 13-14. Like the above cases, *Boyer* determined that the Section 550(b) defense was unavailable because the transferees were initial, rather than subsequent, transferees. *Boyer*, 587 F.3d at 796-797.

Boyer involved a leveraged buyout masked as a sale of a corporation's assets. A closely held corporation sold all of its assets to a newly formed corporation that was given the same name. *Id.* at 790, 793. In exchange, the new corporation paid $3.1 million that it had taken as a loan, using the "purchased" assets as collateral. *Ibid.* The original corporation distributed the money to its shareholders—all of whom were members of the same family—and then ceased operations. *Id.* at 791. The new corporation later filed for bankruptcy. When the $3.1 million payment was challenged, the bankruptcy court held that the payment to the original corporation was a fraudulent transfer. *Ibid.* On appeal, the Seventh Circuit held that the two transactions—(1) the sale of assets in exchange for $3.1 million and (2) the distribution of the $3.1 million to the shareholders—should be "collapsed" and viewed as a single transaction. *Id.* at 796. As such, the shareholders were initial transferees of the $3.1 million, not subsequent transferees, and the Section 550(b) defense was unavailable to them. *Id.* at 796-797.

Petitioner asserts that *Boyer* conflicts with the court of appeals' decision in this case because the Seventh Circuit "without discussion" rejected the shareholders' argument that their liability should be reduced by the value of the assets sold to the new corporation. Pet. 14-15. Petitioner's claim of a conflict relies on the Seventh Circuit's statement: "The defendants make some other arguments, but they do not require discussion." *Boyer*, 587 F.3d at 798. Such

a statement does not create a conflict warranting this Court's review.

Moreover, and in any event, there is no tension between *Boyer* and the court of appeals' decision here. In another part of the opinion, *Boyer* states that the shareholders "gave *nothing* in exchange for their [$3.1 million in] distributions." *Id.* at 796 (emphasis added). Indeed, the leveraged buyout was a fraudulent transfer because "in exchange for the money the shareholders received, they provided *no value* to the corporation but merely increased its debt and by doing so pushed it over the brink." *Id.* at 792 (emphasis added). Because the shareholders paid nothing, their liability could not have been reduced by their payment amount. By contrast, here it is beyond dispute that, in exchange for the properties, Tramiel gave JTS $10 million plus the value of the option.

3. Finally, there is no disagreement between the ruling below and the Ninth Circuit's prior opinion in *In re Straightline*, 525 F.3d 870 (9th Cir. 2008). Even if there were, such an intracircuit conflict would not merit this Court's review. In *Straightline*, there was no avoidance under state law pursuant to Section 544(b). Rather, the transfer found to have been fraudulent was a *post*petition transfer that was avoided under Section 549 of the Bankruptcy Code. *Straightline*, 525 F.3d at 877.

Section 549 provides that the trustee may avoid a postpetition transfer of property of the estate "that is not authorized under this title or by the court." 11

U.S.C. § 549(a)(2)(B). Unlike California law, Section 549 contains no provision limiting the amount that may be avoided by the value that the transferee gave the debtor, and it is on that basis that the court denied such a reduction. *See Straightline*, 525 F.3d at 884 (citing another Section 549 decision, *Walsh v. Alpha Fin. Group* (*In re Rice*), 83 B.R. 8, 13 (B.A.P. 9th Cir. 1987)).

Moreover, unlike here, the transferee would not have been entitled to any "good faith" exception because the bankruptcy court found that the transaction "was a disguised loan in contravention of [the court's] earlier order." *Id.* at 885. The court thus did not hold that such a reduction would never be applicable, but rather that it was not available in that case because "the estate ha[d] a greater equitable claim than" the defendant. *Id.* at 884.

B. The Decision Below Correctly Held That Section 3439.08 Of The California Civil Code Reduces The Amount That The Trustee May Avoid

1. The decision of the court of appeals is correct. And, contrary to petitioner's argument, it is fully supported by the text of Sections 544 and 550 of the Bankruptcy Code. As the court of appeals explained (Pet. App. 14a-15a), Section 550(a) provides that the trustee may recover from initial transferees either the property transferred or the value of such property, but only "to the extent that a transfer is avoided under section 544." 11 U.S.C. § 550(a). And under

Section 544(b), the provision invoked in this case, the trustee may avoid "an interest of the debtor in property" but only to the extent it "is voidable under applicable law"—*i.e.*, state law. *Id.* § 544(b).

Under the state law applicable here, the voidable amount is limited to the difference between the value of the property transferred and the consideration given. Section 3439.07(a) of the California Civil Code permits avoidance of a fraudulent transfer, but such avoidance is expressly made "subject to the limitations in Section 3439.08." Cal. Civ. Code. § 3439.07(a). Section 3439.08 provides that "a good faith transferee * * * is entitled, to the extent of the value given for the debtor for the transfer * * * , [a] reduction in the amount of the liability on the judgment." *Id.* § 3439.08(d)(3).

Thus, all three courts below correctly concluded that because Tramiel was a good faith transferee, the trustee could avoid only the difference between the properties' value and what Tramiel paid for them.

2. Contrary to petitioner's assertion, the court of appeals did not "invoke [its] equitable powers," (Pet. i), or grant Tramiel an "equitable remed[y]," (Pet. 20). Rather, after applying state statutory law as required by the text of the Bankruptcy Code, the court simply observed that its conclusion was consistent with the Code's purposes: "This conclusion effectuates the intent of § 550 to restore the bankrupt estate to the financial condition it enjoyed prior to the transfer." Pet. App. 25a. And the court stated that "[a]llowing

the estate to profit by taking value that should be returned to a good faith transferee does not promote the purpose of § 550 to restore equity." *Ibid.* But the court's holding did not rely on equitable principles; rather, it relied on the text of Sections 544 and 550 and the California fraudulent transfer statutes.

Nor did the decision below "rel[y] on a novel belief that § 550 silently incorporates the [good faith] defense provided in § 548(c) because § 544(b) and § 548 transferees must be subject to symmetrical recoveries." Pet. 21. Rather, the court of appeals merely observed at the end of its discussion that its decision "permits a symmetry with the Bankruptcy Code." Pet. App. 25a. The court of appeals did not hold that the recoveries available under state law through Section 544(b) must be the same as those available under federal law in Section 548.

3. Section 548 highlights, however, that petitioner's unprecedented legal theory would contravene the policies of both federal bankruptcy law and state law, by allowing a double recovery for the estate. Both state and federal law fully protect buyers from losses arising from purchases made in good faith if the purchases are later avoided. *See* Cal. Civ. Code. § 3439.08 (providing good faith purchasers a credit for their purchase price); 11 U.S.C. § 548(c) (giving good faith purchasers a lien on the purchased asset to the extent of the purchase price). Yet petitioner seeks to force Tramiel to pay the full $11.8 million value of the purchased property—actually, more, because petitioner contends the value exceeds that amount—even

though the estate retains the original $10.4 million Tramiel already paid. No authority supports petitioner's notion that Sections 544 and 550 should be read to require a double recovery to the estate when a trustee proceeds under state law.

Moreover, a rule requiring good faith purchasers to pay twice for an avoided transfer would create a strong disincentive to transact with businesses in financial distress. Distressed companies often rely on the ability to convert surplus assets into operating capital by selling them to willing purchasers. But under petitioner's rule, this safeguard would be severely limited, as good faith purchasers would be unable to rely on the protections provided by existing law. Indeed, despite their good faith, purchasers would risk being saddled with a double payment for the purchased asset, even if a bankruptcy judge later determined that the original purchase price was only marginally less than the asset's reasonably equivalent value. Although the purchaser would have an unsecured claim under Section 502(h) of the Bankruptcy Code for the value of the payment made, *see* 11 U.S.C. § 502(h), that negligible prospect for recovery would be insufficient to encourage good faith purchasers to aid struggling companies. Unsecured creditors in Chapter 7 often receive only pennies on the dollar for their claims. Petitioner's proposed new rule thus would hamper distressed companies' ability to raise working capital in troubled economic times.

II. THE COURT OF APPEALS CORRECTLY APPLIED CALIFORNIA'S DEFINITION OF "REASONABLY EQUIVALENT VALUE," AND THAT DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS

A. There Is No Conflict Among The Courts Of Appeals

1. Petitioner argues that the decision below creates a conflict among the circuits over the definition of "value" in Section 550 of the Bankruptcy Code. Pet. 22. But in affirming the bankruptcy court's calculation of the properties' reasonably equivalent value, the court of appeals was not interpreting "value" in Section 550; rather, it was interpreting and applying "reasonably equivalent value" in Section 3439.04 of the California Civil Code. Its decision therefore does not present a question of federal law and could not have created the conflict that petitioner claims.

Because petitioner invoked Section 544(b) of the Bankruptcy Code to seek avoidance, the court of appeals was required to look to applicable California law. As the opinion below explains, "[u]nder California Civil Code § 3439.04(a), a transfer is avoidable if," inter alia, "the debtor made the transfer without receiving a *reasonably equivalent value*." Pet. App. 10a (emphasis added). And the court explained that under California law, reasonably equivalent value may be "the fair market value *or* what would be the fairly equivalent value of the property, taking into

consideration all of the specific circumstances of each case affecting the value of the asset." *Id.* at 10a-11a (emphasis added) (citing *Hansen v. Cramer*, 245 P.2d 1059 (Cal. 1952); *Bailey v. Leeper*, 298 P.2d 684 (Cal. Ct. App. 1956)). Thus, in determining the extent to which the transfer was avoidable, the court considered the properties' reasonably equivalent value in light of the fact that the properties were bundled together and sold quickly. *Id.* at 11a-12a.

2. Petitioner claims that the court of appeals' calculation of the "reasonably equivalent value" of the JTS properties conflicts with this Court's decisions in *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994), and *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997). Petitioner asserts that those decisions hold that "value" in Section 550 "means either a property's fair market value or, in very limited cases, its foreclosure sale price." Pet. 22-23 (emphasis omitted). Thus, petitioner argues that the court below should have used "fair market value" rather than "reasonably equivalent value."

But *BFP* and *Rash* are inapposite because they interpreted provisions of federal law, not the state law provision at issue here. *BFP* interpreted the meaning of "reasonably equivalent value" in Section 548 of the Bankruptcy Code, which permits the trustee to avoid a fraudulent transfer made within two years before the date of the filing of the petition (but protects a good faith buyer by providing a lien under Section 548(c)). 511 U.S. at 535. And *Rash* construed "value" in Section 1325(a)(5)(B) of the

Bankruptcy Code—the Code's "cram down" provision. 520 U.S. at 955-956. This Court's interpretations of those provisions do not govern the interpretation of "reasonably equivalent value" in Section 3439.04(a) of the California Civil Code, as incorporated into Section 544 of the Bankruptcy Code.

Regardless, the court of appeals' decision is in harmony with *BFP* and *Rash*. This Court held in *BFP* that the reasonably equivalent value of property sold at foreclosure is not necessarily the full "fair market value" or the price that could be obtained "if it did not have to be sold within the time and manner strictures of state-prescribed foreclosure." 511 U.S. at 539. The Court reasoned that "property that must be sold within those strictures is simply worth less." *Ibid.* (emphasis omitted). That is because "[n]o one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques." *Ibid.* Thus, courts need not "ignore that characteristic of the property," just as they would not "ignore other price-affecting characteristics." *Ibid.*

Likewise, in *Rash*, after the Court decided that "value" of a car in Section 1325(a)(5)(B) means the car's "replacement value," the Court stated that it would "leave[ ] to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented." 520 U.S. at 965 n.6. The Court explained that bankruptcy courts might need to make "adjustment[s]" to the

car's retail price in view of the individual circumstances of each case. *Ibid.*

Just as *BFP* and *Rash* held that bankruptcy courts, as factfinders, need not ignore circumstances that affect the value of property, the bankruptcy court below was free to find that the properties JTS sold to Tramiel were worth less because they were sold quickly and as a bundle.

In any event, at bottom, petitioner's complaint is actually about the court of appeals' interpretation of California's "reasonably equivalent value" standard. This Court's review of that state law question is not warranted. *See* S. Ct. R. 10; *see also Cort v. Ash*, 422 U.S. 66, 72 n.6 (1975) (this Court's "practice of deference" to the courts of appeals' "determinations of questions of state law * * * should generally render unnecessary review of their decisions in this respect").

3. Nor does the decision below conflict with any of the other decisions cited by petitioner. Pet. 24-25.

In re Taylor, 599 F.3d 880 (9th Cir. 2010), is an opinion from the Ninth Circuit; thus, any conflict would, at most, be an intracircuit conflict not warranting this Court's review. Moreover, the court in *In re Taylor* stated that the "bankruptcy court * * * has *discretion* on how to value the property so as to put the estate in its pretransfer position." 599 F.3d at 890 (emphasis added). Such discretion is incompatible with petitioner's inflexible fair-market-value-only approach.

And the passing reference to "market value" in *In re Trout*, 609 F.3d 1106, 1112 (10th Cir. 2010), does not conflict with the decision below. Petitioner acknowledges that the reference is "dicta." Pet. 25. The issue in *Trout* was whether, after finding a fraudulent transfer, the bankruptcy court must order recovery of some property or its value under Section 550 or may conclude that the automatic lien avoidance provision in Section 551 adequately protects the estate. 609 F.3d at 1107-1108. *Trout* did not discuss whether "fair market value" or "reasonably equivalent value" was the correct measure. *See id.* at 1112.

Petitioner's citations to opinions from bankruptcy courts (Pet. 25) do not merit extended discussion, as any disagreement among the bankruptcy courts does not warrant this Court's review. In any event, as in *Trout*, neither of those decisions involved whether "fair market value" or "reasonably equivalent value" was the correct measure after avoidance under Section 544(b).

B. Even If There Were A Disagreement Among The Circuits, This Case Would Not Be A Suitable Vehicle To Resolve It

Even if the court of appeals had agreed with petitioner and used the properties' undiscounted value ($17,147,185) rather than the reasonably equivalent value after the bundling and quick-sale discounts ($11,820,000), the outcome of this case would have been unchanged.

Tramiel's liability, before applying the settlement credit, is the difference between the properties' value and the value of what Tramiel paid. Pet. App. 24a. Tramiel paid $10 million in cash plus the value of the one-year repurchase option. *Ibid.* If the court of appeals had used $17,147,185 as the properties' value as petitioner urges, the value of the option that Tramiel gave also would have been much higher. That is because the option's value is calculated as the difference between the properties' value and the option's strike price. *Id.* at 12a-13a (citing *In re Calvillo*, 263 B.R. 214 (W.D. Tex. 2000)). If the value were $17,147,185, then because the strike price was calculated to be $10,432,815, the option would have been valued at $5,760,000. Thus, even under petitioner's theory, Tramiel already paid $10 million in cash plus an option valued at $5,760,000, for a total of $15,760,000. That makes his liability $1,387,185 ($17,147,185 minus $15,760,000), which is the exact same amount calculated by the court of appeals. *Id.* at 24a. And that liability is more than offset by the $4.5 million settlement credit. *Id.* at 33a. Accordingly, the end result would be the same even under petitioner's proposed rule: petitioner would recover nothing from Tramiel.

To be sure, when the district court (in its reversed decision) applied petitioner's proposed rule and used the full, undiscounted value of the properties, it failed to recalculate the value of the option to take the higher value into account. For the reasons explained above, that was erroneous. In any event,

this fact-bound inquiry does not warrant this Court's review. The important point is that even under petitioner's proposed rule, the court of appeals' judgment would be affirmed. Eugene Gressman et al., SUPREME COURT PRACTICE 248 (9th ed. 2007) (discussing *Sommerville v. United States*, 376 U.S. 909 (1964)).

III. THERE IS NO CONFLICT CONCERNING ENTITLEMENT TO SETTLEMENT CREDITS FOR CONSTRUCTIVE FRAUDULENT TRANSFER LIABILITY, AND THE DECISION BELOW IS CORRECT IN ANY EVENT

Petitioner argues that there is a conflict over whether entitlement to settlement credits for fraudulent transfer liability is governed by federal or state law. No such conflict exists. And even if it did, this case would be a poor vehicle to resolve it, because applying federal law would make no difference to the outcome of this case.

A. The Lower Courts Are Not In Conflict Over Whether Federal Or State Law Governs Entitlement To Settlement Credits When The Trustee Brings A Fraudulent Transfer Claim Under State Law

As to the question whether the $4.5 million settlement by the other defendants should offset Tramiel's liability, the court of appeals did not discuss the question presented here—whether state or federal law governs. But all three lower courts correctly applied California law, as Section 544 requires. The bankruptcy court explained that "when State law

forms the substance of the underlying claim, Federal Courts will apply State Court settlement procedures in determining whether a settlement credit is appropriate." Pet. App. 144a; *see also* Pet. App. 114a.

Petitioner identifies three court of appeals' decisions that he contends conflict with that application of state law. Pet. 27-28. None of them presents a clear conflict.

First, the Eleventh Circuit's opinion in *In re Prudential of Florida Leasing, Inc.*, 478 F.3d 1291 (11th Cir. 2007), did not discuss the precise issue here: whether state or federal law governs entitlement to settlement credits when a transfer is avoided under *state* law via Section 544(b). Indeed, language in the *Prudential* opinion suggests that if the court were to directly address that precise question, it might agree with the court of appeals' decision in this case. *Prudential* states that where "the Trustee file[s] a claim *under state law*" for fraudulent transfer, then "the right of [the transferee] to a reduction in the amount of its liability" on account of a settlement "would arise *under state law*." *Id.* at 1300 (emphasis added). But where "the Trustee has filed only *federal* claims against [the transferee]," *ibid.*, *federal* common law interpreting Section 550(d)—which provides that the "trustee is entitled to only a single satisfaction"—governs, *id.* at 1297 (emphasis added) (citation omitted).[2]

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[2] This illustrates one of many differences in pursuing claims pursuant to Section 544 versus pursuant to Section 548.

Nor is there conflict between the decision below and the Fourth Circuit's *unpublished* opinion in *Bowers v. Kuse Enterprises, Inc.* (*In re Florida Hotel Properties Limited Partnership Plan Trust Agreement*), 172 F.3d 43, 1998 WL 957455 (4th Cir. 1998) (table opinion). There, the Trustee had pursued a fraudulent transfer claim under *federal*, not *state*, law—specifically, Section 549. *Id.* at *1.

Likewise, the ruling below does not conflict with the Ninth Circuit's prior opinion in *In re Lendvest Mortgage*, 42 F.3d 1181 (9th Cir. 1994). *Lendvest* did not decide whether federal or state law applies, and it is not even clear which law the court applied. In any event, any intracircuit disagreement would not merit intervention by this Court.

Moreover, the court of appeals here did not explain why it applied state rather than federal law to determine whether Tramiel was entitled to a settlement credit. Pet. App. 25a-32a. If this issue is worthy of this Court's review, and if this Court is inclined to review it, it should await a decision in which the court of appeals sets forth its reasoning.

B. Even If There Were A Conflict, This Case Would Not Be A Suitable Vehicle To Resolve It

In any event, if the lower courts had applied petitioner's proposed rule here, the result would have been the same: Tramiel's liability would have still been satisfied by the settlement of the other defendants to avoid double recovery by the trustee.

Petitioner claims that there are two criteria for a settlement credit under federal law: (1) a finding of joint liability between the settling and non-settling defendants, and (2) an allocation of the settlement amount toward the claims on which the non-settling defendant is jointly liable. Pet. 29-30.

Here, the bankruptcy court found that Tramiel and the settling defendants were jointly liable for claims arising in connection with the fraudulent transfer. The bankruptcy court relied on the fact that the trustee alleged that both Tramiel and "also * * * the settling defendants were responsible for the estate's injuries arising out of the sale of the real property to Tramiel, and those claims were covered by the settlement at issue." Pet. App. 145a. The court found that there were some claims for which "the settling defendants and Tramiel were jointly liable" and that there were "other non-joint claims." *Ibid.* Petitioner claims that this was not sufficient for a finding of joint liability. Pet. 30 n.19. But the Ninth Circuit concluded otherwise. Pet. App. 32a. In any event, the factbound dispute over the sufficiency of this finding does not warrant this Court's review and is yet another reason why this case is not a suitable vehicle to review the question presented.

Additionally, the bankruptcy court stated that if it were to conduct an allocation of the settlement among the joint and non-joint claims, it would allocate sufficient settlement amounts to the fraudulent transfer claim such that Tramiel's liability would still be satisfied. The court stated: "I considered what I

might do in terms of allocating the settlement now. If I were to undertake an allocation at this point in the case, it's likely that I would follow the judgment that I've already entered, and I realized that result would really be the same as following the plain words of [Section 877 of the California Code of Civil Procedure]." *Id.* at 148a.

Accordingly, petitioner would not prevail even under the legal rule that he seeks to press in this Court. That is further reason to deny review. Gressman, *supra*, at 248.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

CALIFORNIA CIVIL CODE

Division 4. General Provisions
Part 2. Special Relations of Debtor and Creditor
Title 2. Fraudulent Instruments and Transfers
Chapter 1. Uniform Fraudulent Transfer Act

§ 3439.04. Transfer with intent to defraud or transfer not given in exchange for value: Determining actual intent

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation as follows:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor.

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor either:

(A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

(B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(b) In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following:

(1) Whether the transfer or obligation was to an insider.

(2) Whether the debtor retained possession or control of the property transferred after the transfer.

(3) Whether the transfer or obligation was disclosed or concealed.

(4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(5) Whether the transfer was of substantially all the debtor's assets.

(6) Whether the debtor absconded.

(7) Whether the debtor removed or concealed assets.

(8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.

(11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

(c) The amendment to this section made during the 2004 portion of the 2003-04 Regular Session of the Legislature, set forth in subdivision (b), does not constitute a change in, but is declaratory of, existing law, and is not intended to affect any judicial decisions that have interpreted this chapter.

CALIFORNIA CODE OF CIVIL PROCEDURE

Part 2. Of Civil Actions
Title 11. Contribution Among Joint Judgment Debtors
Chapter 1. Releases From and Contribution Among Joint Tortfeasors

§ 877. Effect of release, dismissal, or covenant not to sue or enforce judgment

Where a release, dismissal with or without prejudice, or a convenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect:

(a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant,

or in the amount of the consideration paid for it whichever is the greater.

(b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties.

(c) This section shall not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves.

(d) This section shall not apply to a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment given to a co-obligor on an alleged contract debt where the contract was made prior to January 1, 1988.